No. 95-157

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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1. Respondents contend that the Ninth Circuit's en banc holding amounts to "nothing more than a recitation of the truism that great deference is given to the district court's rulings on discovery." Martin Br. in Opp. 11; see Rozelle Br. in Opp. 5-8; Hampton Br. in Opp. 8, 16. The court of appeals did far more, however, than reaffirm that district court discovery orders are reviewed for an abuse of discretion. Rather, the court reformulated the legal standards that govern a district court's exercise of discretion in granting discovery on claims of selective prosecution, and in doing so significantly departed from the established law in this area.

The court of appeals squarely held that a district court may order discovery on a claim of selective prosecution based solely on evidence that persons of a particular race have been prosecuted, without any evidence that similarly situated persons of a different race have not been prosecuted. Pet. App. 18a-19a & n.6. The court specifically stated that "no 'comparison pool' is necessary when the record contains statistical evidence tending to show that only members of racial or ethnic minority groups have been prosecuted." *Id.* at 19a n.6. Our petition seeks review of that unprecedented legal ruling.

Contrary to respondents' view, the importance of that issue is not diminished by the fact that district courts generally have considerable discretion to issue discovery orders. "[D]iscretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975), quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d) (Marshall, C.J.). Indeed, as respondent Martin acknowledges, "[w]hether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise." Br. in Opp. 15, quoting *United States* v. *Taylor*, 487 U.S. 326, 336 (1988). It is especially important that those legal principles be clear in the discovery context because the absence of standards permits the entry of highly intrusive orders that delay prosecutions.

2. Respondents contend that the court of appeals' ruling correctly recognizes that defendants should not have to prove their claim in order to obtain discovery. Martin Br. in Opp. 16-17; Hampton Br. in Opp. 10, 14. In challenging the court of appeals' ruling, however, we do not argue that criminal defendants must conclusively prove that others similarly situated have not been prosecuted in order to obtain discovery. Rather, we argue (Pet. 14) that criminal defendants must make a substantial threshold showing on each element of a selective prosecution claim. That showing need not be of the same force as would be required to establish a prima facie case, but it must at a minimum address each element of the claim. The court of appeals has dispensed with the requirement of such a threshold showing on each element by adopting a novel legal presumption that the government's prosecution of members of one race means that it has failed to prosecute similarly situated members of a different race, unless the government introduces compelling evidence to the contrary. Pet. App. 18a-19a & n.6.

3. As we explain in our petition (Pet. 19-21), the court of appeals' decision in this case conflicts with decisions from numerous circuits that have held that discovery on a claim of selective prosecution may not be ordered absent a threshold showing that similarly situated persons have not been prosecuted. Respondents assert that there is no such conflict. Martin Br. in Opp. 21-28; Rozelle Br. in Opp. 7. According to respondent Martin (Br. in Opp. 23), the court's decision is consistent with that of other circuits because the court in this case found a colorable basis for believing that similarly situated persons had not been prosecuted. As we have explained, however, the court in this case in fact eliminated the requirement that defendants must make a threshold showing that others similarly situated have not been prosecuted in order to obtain

discovery, and relied on a presumption that such persons exist. No other circuit has dispensed with the required showing of a disparity in a discovery case, as did the court in this case.[1]

Respondent Martin contends (Br. in Opp. 24-27) that the decisions from the other circuits upon which we rely are distinguishable either because the defendants in those cases introduced even less evidence than respondents did or because the court of appeals was affirming a district court's exercise of discretion. The key point, however, which Martin does not address, is that all of those decisions squarely held that discovery on a claim of selective prosecution may not be ordered absent concrete evidence that similarly situated persons of a different race have not been prosecuted. See Pet. 19-20. The court of appeals in this case is the first to dispense with that requirement.

4. Finally, respondents argue (Martin Br. in Opp. 17-21; Rozelle Br. in Opp. 17 n.6; Hampton Br. in Opp. 12) that the decision below has no significant impact.

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[1] Contrary to respondent Hampton's contention (Br. in Opp. 9), the court of appeals did not base its legal ruling on the affidavits submitted by defense counsel, which, respondent asserts, show that numerous whites have been prosecuted in state court for crack offenses. While the court referred to those affidavits, it held that the evidence that the government had prosecuted members of a particular race was itself sufficient to trigger a discovery obligation. Pet. App. 17a. The court's limited discussion of the defense counsel affidavits is understandable. The district court did not rely on them to exercise its discretion. C.A. E.R. 184. The affidavits consist of vague and conclusory hearsay. And they do not contain any evidence that the white defendants prosecuted in state court for crack offenses are in any way similarly situated to those who have been prosecuted in federal court.

But the burden to respond to discovery motions under the court of appeals' extraordinarily lenient legal standard is significant, as is the potential for intrusion on prosecutorial discretion (Pet. 13). As we explain in our petition, numerous motions have been filed in the wake of the court's decision, and many more can be expected in the future. Pet. 22-25.[2]

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For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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[2] Contrary to respondent Martin's contention (Br. in Opp. 18-19 & n.6), the government's successful defense against a discovery motion in *United States* v. *Henry*, No. CR 94-628-CBM (C.D. Cal. June 26, 1995), does not show that the court's decision in this case has a limited impact. Nothing in the *Henry* decision precludes district court judges from ordering discovery in other cases. In fact, based on a showing similar to the one made in this case, one district court judge has just ordered discovery on a claim of selective prosecution. *United States* v. *Turner*, No. CR 94-649 (C.D. Cal. Oct. 12, 1995). Martin also relies (Br. in Opp. 11, 19 n.6) on *United States* v. *Marshall*, 56 F.3d 1210 (9th Cir. 1995), where the court of appeals affirmed a district court's refusal to order discovery. But nothing in that decision purports to disturb the holding in this case that district courts have broad discretion to order discovery on a claim of selective prosecution, without any evidence on an essential element of that claim.